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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 663

PADUCAH NEWSPAPERS, INCORPORATED; D. E. HAYES, J. E. LOVVO, AND GEORGE W. BYRD, MEMBERS OF AND REPRESENTATIVES OF THE PADUCAH CENTRAL LABOR UNION; AND PADUCAH CENTRAL LABOR UNION, A VOLUNTARY ASSOCIATION,

Petitioners,

vs.

GERALD WISE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Paducah Newspapers, Incorporated, D. E. Hayes, J. E. Lovvo, George W. Byrd, and Paducah Central Labor Union, pray that a writ of certiorari issue to review the final judgment of the Court of Appeals of Kentucky, entered on June 22, 1951, affirming a judgment of the Circuit Court of McCracken County, Kentucky, whereby certain damages were awarded the respondent,

Gerald Wise, against petitioners. (Petitions for rehearing were overruled on December 21, 1951).

Opinions Below

No opinion was written by the McCracken Circuit Court. The opinion of the Court of Appeals of Kentucky, as modified on rehearing, has not at the time of writing this petition been published in the reports or advance sheets; it is printed at pages 151 to 159 of the Record herein.

Jurisdiction

1. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3), providing in substance for the review by the Supreme Court of the United States of final judgments of the highest court of a State in which a decision could be had by writ of certiorari, where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States (inter alia).

2. The Court of Appeals of Kentucky is the highest court of the State.

3. The judgment of which review is sought (R. 150) is a final judgment of the Court of Appeals of Kentucky.

4. The right, privilege or immunity claimed by the petitioners to exist under the Fourteenth Amendment to the Constitution of the United States is the right of a labor organization, its agents, and a daily newspaper to publish a paid newspaper advertisement stating in substance that respondent was unfair to organized labor, where respondent prior thereto had part of his place of business painted by a person not a member of any labor organization.

5. The Federal question of the existence of such right was seasonably raised and considered. In the trial court, general demurrers were filed by petitioners to respondent's

petition (R. 10), and upon the argument of same petitioners specifically relied upon *American Federation of Labor* v. *Swing*, 312 U. S. 321, and *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293. These demurrers were overruled by that court and proper exception taken by petitioners (R. 11). On the trial of the cause, at the conclusion of respondent's (plaintiff's) evidence and again at the conclusion of all of the evidence, petitioners offered and requested the trial court to give to the jury a peremptory instruction in petitioners' favor, and argued the same matter, but the court refused so to do (R. 43 and 44). In their motions for new trial (R. 37 and 39), after verdict and judgment in respondent's favor, petitioners again raised the same question, particularly in the following language: ". . . the verdict of the jury is further contrary to law, in that it amounts to a denial to these defendants of the rights of free speech and freedom of the press which are guaranteed to these defendants by the Constitution of the United States, which is the supreme law of the land." (R. 40). These motions were overruled by the trial court.

On the appeal to the Court of Appeals of Kentucky, petitioners again by brief (assignments of error are not required in Kentucky) raised the same question and again by petitions for rehearing. (R. 159 to 169). In its final opinion as modified (R. 151), affirming the judgment of the trial court, the Court of Appeals specifically rejected petitioners' claim to Constitutional protection, in the following language: "One of the principal cases they (meaning petitioners) rely upon is *Cafeteria Employees Union, Local 302 et al.* v. *Angelos et al.*, 320 U. S. 293, wherein the United States Supreme Court held that a state court has no unrestricted right to enjoin picketing of a place of business conducted by the plaintiffs without the aid

of employees. Apparently the decision was that the injunction . . . violated the right of freedom of speech guaranteed by the Federal Constitution . . . Appellants (i.e., petitioners) seize upon this decision . . . as establishing that the Fourteenth Amendment to the Federal Constitution protects a labor union's right to use the word 'unfair' indiscriminately, and therefore it cannot be libelous. Whatever meaning the language of the opinion was meant to convey, it supports no such theory." (R. 153).

The Question Presented

Is a statement, published in a newspaper at the instance of a labor organization, to the effect that an employer is "unfair" to organized labor (where such employer had concededly had part of his place of business painted by an employee not belonging to any labor organization), protected by the Constitutional guaranty of freedom of communication implicit in the Fourteenth Amendment, so that such statement may not be made the basis for damages by a state court in an action for libel?

Specification of Errors to Be Urged

The Kentucky Court of Appeals erred:

1. In holding that the published statement in question was not one within the purview of the protection of the Fourteenth Amendment, and that an action for libel might therefore be founded thereon.

2. In failing to hold that the statement was protected by the Fourteenth Amendment, and therefore not actionable.

3. In affirming the judgment of the trial court.

Statement of the Case

The following facts are, petitioners believe, not in dispute: The respondent, Wise, opened a restaurant known as "Wise's Cream Castle" in Paducah, Kentucky, on or about June 4, 1949. Shortly before beginning operation thereof, he had approximately 48 square feet of the glass front of his building painted by a casual employee who was not a member of the Paducah local of the painters' union or of any other labor organization. At the instance of the painters' local, the petitioner Paducah Central Labor Union (a federated body to which the painters' local belonged and which exists for the purpose, among others, of informing the members of its various affiliated local unions of each other's grievances and problems) on July 18, 1949, caused the following advertisement to be printed in the Paducah Sun-Democrat, a daily newspaper published by the petitioner Paducah Newspapers, Incorporated:

"Notice, Members of Labor:

> Wise's Cream Castle, 6th and Jackson Streets, and Lawrence's Lunch Stand, Lovelaceville Road, are unfair to you.
>
> Paducah Central Labor Union."

On August 13, 1949, respondent brought this action for libel. A trial resulted in verdict and judgment for $1,000.00 against Paducah Newspapers, Incorporated, and for $5,000.00 against the other petitioners. On appeal, as above stated, the case was affirmed by the Kentucky Court of Appeals.

Reasons Relied On for Allowance of the Writ

The Kentucky Court of Appeals in this case has decided an important question arising under the Fourteenth Amendment to the Constitution of the United States, directly

involving the freedom of the press and the right of labor unions to make known, *through newspaper publication alone,* grievances against employers, in a way untenable and in conflict with the applicable decisions of this Court and especially the following cases:

American Federation of Labor v. *Swing,* 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855;
Bakery & Pastry Drivers & Helpers Local 802 v. *Wohl,* 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178;
Cafeteria Employees Union v. *Angelos,* 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58.

It is well established that the Fourteenth Amendment imposes upon the states, and therefore upon the courts of the states, the same restrictions against infringement of the freedoms of speech and of the press which, as against the Federal Government, are explicitly spelled out in the First Amendment, and that those freedoms embrace the peaceable activities of labor organizations and, indeed, the whole field of employer-employee relations. *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; *American Federation of Labor* v. *Swing, supra.*

True it is that, in more recent cases, this Court has indicated that it no longer in all instances equates *picketing* (even though peaceful) with *communication as such,* and that, at least where such picketing is conducted for objectives which the state regards as unlawful or against its public policy, it may be subjected to some degree of state control. *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834; *Hughes* v. *Superior Court of California,* 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985; *International Brotherhood of Teamsters, etc.* v. *Hanke,* 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995; *Building Service Employees International Union* v. *Gazzam,* 339 U. S. 532,

70 S. Ct. 784, 94 L. Ed. 1045. But in each of these cases, the Court has been careful to point out as the basis for its decision the differences between picketing and mere publication or communication and between the respective effects of each. Everything which the Court has written about freedom of communication in the *Swing* and *Angelos* cases is, petitioners believe, still the law and likely to remain so, where *communication only* is involved.

The *Swing* case is particularly authoritative with reference to the case at bar, when read in connection with the opinion of the State court in *Swing* v. *American Federation of Labor,* 372 Ill. 91, 22 N. E. (2d) 857. The facts were that the union had picketed a beauty shop with banners reciting that the owner was "unfair to organized labor." The Illinois court held that the banners were libelous, in that the employer was willing to have his employees join the union but none of them wished to do so, holding further that the picketing was not protected by the constitutional guaranty of free speech, since that freedom "does not include freedom to libel." It therefore granted an injunction against the picketing as "an accomplished and continuing libel." This Court, (U. S. Sup.) however, struck down the injunction as inconsistent with freedom of speech.

In the instant case, the Kentucky Court of Appeals also met the argument that the statement complained of could not be actionable as libel because protected by the Fourteenth Amendment, by saying in substance that the statement was not protected by the Fourteenth Amendment because it was libelous. This, of course, is a mere begging of the question, of the type indulged in by the Illinois court in the *Swing* case. Petitioners believe that the constitutional doctrines which this Court has enunciated can-

not be disposed of by inferior tribunals in so cavalier a fashion—or at least ought not to be.

Even more authoritative than the *Swing* case is *Cafeteria Employees Union* v. *Angelos, supra.* Therein this Court held that, notwithstanding the fact that the union members had never been employed by the plaintiffs (who in fact had no employees, conducting their business themselves), the union's picketing in an effort to organize, carrying signs which labeled the employer as "unfair", was within the scope of the constitutional guaranty of free communication, saying that "To use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts."

In the instant case it is inconceivable that, at this late date, a labor organization, its members and a newspaper should be penalized by the imposition of a substantial judgment at the hands of a State court for the mere publication of a slogan which is conventional and even traditional in the circumstances. That such conventionality has been recognized by the courts for more than a generation, apart from any considerations of constitutional law, is evidenced by the long line of cases (constituting the great weight of authority on the subject) holding that published statements that one is "unfair to labor" are not actionable. *Blossom Dairy Co.* v. *International Brotherhood of Teamsters,* 125 W. Va. 165, 23 S. E. (2d) 645; *C. S. Smith Met. Market Co.* v. *Lyons,* 16 Cal. (2d) 389, 106 P. (2d) 414; *Cinderella Theater Co.* v. *Sign Writers Local Union,* 6 F. Supp. 164; *Robison* v. *Hotel & Restaurant Employees, Local No. 782,* 35 Idaho 418, 207 Pac. 132, 27 A.L.R. 642; *J. F. Parkinson Co.* v. *Building Trades Council,* 154 Cal. 581, 98 Pac. 1027, 31 L. R. A. (N.S.) 550, 16 Ann. Cas. 1165; *Emde* v. *San Joaquin County Cen-*

tral Labor Council, 23 Cal. (2d) 146, 143 P. (2d) 20, 150 A.L.R. 916; *Montgomery Ward & Co.* v. *McGraw-Hill Publishing Co.,* 146 F. (2d) 171; *Park & Tilford Import Corp.* v. *International Brotherhood of Teamsters,* 27 Cal. (2d) 599, 164 P. (2d) 891; *Steffes* v. *Motion Picture Machine Operators Union,* 136 Minn. 200, 161 N. W. 524; *Labor Review Publishing Co.* v. *Galliher,* 153 Ala. 364, 45 So. 188, 15 Ann. Cas. 674; *J. B. Watters & Sons* v. *Retail Clerks Union,* 120 Ga. 424, 47 S. E. 911.

Petitioners most earnestly urge that this Court grant the requested writ and review the Kentucky court's judgment. The decision is one which is not merely of interest and importance to the parties themselves, but of considerable public interest. It directly involves the rights, not merely of a small town newspaper, a handful of trades unionists, and a restaurant owner, but the rights of all newspapers, labor unions and employers in the State of Kentucky. If the decision of the Kentucky court is permitted to stand, Kentucky newspapers and Kentucky labor union members will be deprived of a right which for years they have supposed themselves to possess and have actually exercised. And further, if the decision is permitted to stand, it will, to some extent, as a precedent, affect the rights of citizens of other states. We sincerely hope that this Court will give petitioners the opportunity to stand before its bar and convince the Court that this thing ought not to be allowed to happen.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 663.

PADUCAH NEWSPAPERS, INCORPORATED; D. E. HAYES, J. E. LOVVO, and GEORGE W. BYRD, Members of and Representatives of The Paducah Central Labor Union; and PADUCAH CENTRAL LABOR UNION, a Voluntary Association, - - - - Petitioners,

versus

GERALD WISE, - - - - - - Respondent.

BRIEF FOR RESPONDENT.

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OPINION OF COURT BELOW.

The opinion of the Court of Appeals of Kentucky has not at the time of the writing of this brief been published in the reports or advance sheets; it is printed at pages 151-159 of the record.

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IN THE

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PADUCAH NEWSPAPERS, INCORPORATED; D. E. HAYES, J. E. LOVVO, and GEORGE W. BYRD, Members of and Representatives of The Paducah Central Labor Union; and PADUCAH CENTRAL LABOR UNION, a Voluntary Association, - *Petitioners,*

v.

GERALD WISE, - - - - - *Respondent.*

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

A member of Painters' Local No. 500 of Paducah, while passing the respondent's place of business in an automobile, saw a negro painting, and reported it to the Union Local (R. 118 and 120). No complaint was made to respondent, nor was he apprised of his trans-

gression by any member of the Union (R. 60, 62, 78, 79, 85, 86 and 87). The Painters' Local simply reported to the Central Labor Union and that organization procured the publication of the advertisement, which is the subject of this law suit. The newspaper, one of the petitioners, ran the advertisement for a paid consideration. The advertisement is set out in the opinion of the Kentucky Court of Appeals in essentially the same manner in which it appeared in the newspaper (R. 152).

There is no positive evidence that the negro was not a member of some Union. There is evidence that he was not a member of Local No. 500, for, as was stated by one of the witnesses for the petitioners, there are no negroes in that Local (R. 121).

The advertisement caused a material diminution of the respondent's business (R. 88-90).

THE ARGUMENT.

I.

Petitioners Did Not Furnish Brief Supporting Their Petition.

We wish to point out that petitioners did not furnish counsel for respondent with copy of their brief in support of their petition, in accordance with Rule 38 of this Court. We assume that no such brief was filed.

II.

The Language Used in the Advertisement Was Libelous.

The Kentucky Court of Appeals laid down this narrow rule with reference to libelous statements in the opinion below at (R. 156-157):

> "We do not decide that the publication in the present case was libelous as a matter of law. What we do declare is that labor unions, as others, may be civilly liable when they falsely charge an employer with being 'unfair,' where there exists no controversy or other circumstance which would reasonably justify the intentional damage of the employer's business. Therefore, the published statement was not privileged, and the determination of whether or not it constituted libel was properly submitted to the jury."

It is submitted that to the ordinary prospective customer of the respondent, the phrase "unfair to you" meant that Wise was a cheat, a trickster and dishonest. There was nothing in the advertisement to indicate that he had trampled upon the feelings of the Painters' Union. The phrase "unfair to you" carried the meaning to everyone who considered himself a member of labor that the respondent in the operation of his restaurant business would probably mistreat them if they patronized him. There can be no doubt that the publishers of the advertisement expected and intended that the advertisement should be read in its most damaging sense, and that it was the specific hope of the union that it would deter as many people as possible

from doing business with the respondent (R. 67 and 78).

Anything other than culpably gross negligence and utter indifference as to the right of respondent on the part of the newspaper would have told them from the face of the advertisement itself what it was designed to accomplish. We do not believe that the members of this Court would want us to labor them with authorities to the effect that it was the newspaper's obligation to use reasonable care in a case of this kind, nor the fact that the Paducah Central Labor Union and its affiliates claims some 4,000 members in McCracken County and that the newspaper has a circulation of approximately 23,000, entitles either of them to any special privilege to abuse the right of free speech and free press.

III.

Freedom of Speech and Freedom of the Press Does Not Mean Freedom to Libel.

If the contention of the petitioners is correct, then a labor union or any organization remotely connected therewith, may publish damaging statements concerning a small business man without any attempt to bargain with him, without confronting him with their grievance, or in any other manner informing him of their displeasure, regardless of how ridiculous or groundless it may be. Can there be a dispute existing between two parties when the party who considers himself aggrieved never approaches the other with his grievance?

In other words, according to the contention of the petitioners, the advertisement could just as well have been signed by the Carpenters' Local even though the act of the respondent was one that the Painters' Local was upset about. The last sentence of Section 8 of the Constitution of Kentucky states:

> "Every person may freely and fully speak, write and print on any subject, *being responsible for the abuse of that liberty.*" (Emphasis ours.)

The exercise of free speech and freedom of the press has never been an unqualified right. Milk Wagon Drivers' Union v. Meadowmoor Dairy, 312 U. S. 287, 61 S. Ct. 552. We believe the petitioners grossly abused the liberties guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and we have been unable to find any statement by this Court to the effect that such words as used in this instance are not libelous.

This Court has recognized the constitutional right of States and of Congress to proscribe picketing and freedom of speech where such activities are engaged in to further unlawful objectives even though the statements used were true. International Brotherhood of Electrical Workers, etc., v. National Labor Relations Board, 341 U. S. 694, 71 S. Ct. 954.

Petitioners complain that the decision of the Kentucky Court runs afoul of the decisions of this Court as contained in the following cases:

American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855;

Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178;

Cafeteria Employees Union v. Angelos, 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58.

Our interpretation of the Swing case, when the facts of that case are considered, is that this Court denied:

> "States the right to assert as comon law, that there can be 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union, unless the employers or the employees are in controversy with him."

Obviously, such a rule by a State would circumscribe the activities of the union to such an extent as to practically preclude them.

The Wohl case, it seems to us, was based upon the following findings of the trial Court, as set out in the opinion of this Court, at 315 U. S. 773:

> "The trial Court found that the placards were truthful and accurate in all respects; that the picketing consisted of no more than two pickets at any one time and was done in a peaceful and orderly manner without violence or threat thereof; that it created no disorder; that it was not proved that any customers turned away from such bakeries by reason of the picketing; and it was not established that the respondents sustained any material loss by reason thereof."

Even the request of the union in that case was only that the defendants be permitted to truthfully advise the public of its cause.

The Angelos case, *supra,* dealt with a blanket injunction which permanently enjoined the union from publicizing its side of a controversy in and around the employer's place of business. This Court did not hesitate to set forth even in that opinion that:

> "In a setting like the present, continuing representations unquestionably false and acts of coercion going beyond the mere influence exerted by the facts of picketing, are of course, not constitutional prerogatives."

It must be remembered that in the case at bar, we are dealing with an unquestionably false statement, or certainly one found to be so by the jury, and with the sole effort on the part of the State Court to give the small business man in this case, a remedy for a false and improper statement.

This Court has recognized the essentiality of preserving some of the rights of the little business man. International Brotherhood of Teamsters v. Hanke, 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995. The Hanke case, *supra,* as well as that of Hughes v. Superior Court of California, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985, recognizes that the policy of a State in such matters as the one at Bar may be expressed by the highest Court of that State as well as the Legislature.

We think the case of the Building Service Employees Union v. Gazzam, 339 U. S. 532, 70 S. Ct. 789, 94 L. Ed. 1045 and of Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 69 S. Ct. 718, 94 L. Ed. 985, are squarely in point and should control the decision of this Court in this case. The distinction between those

two cases and the Swing and Angelos cases, *supra,* is amply discussed therein. We should further point out that the Swing and Angelos cases were cases where the "facts" of a labor dispute were sought to be communicated and where a dispute actually existed. We find no statement in either of those cases to the effect that false statements may be made freely and without any accountability whatsoever.

Repeatedly, this Court has sought to steer the States toward a system opposed to dealing with labor situations in broad general terms, Hughes v. Superior Court of California and cases there cited.

The case at Bar is an attempt by a State Court to give the respondent a remedy for a falsely and maliciouly made statement and the Kentucky Court of Appeals was careful to point out that they did not intend to diminish the "important rights of labor or labor organizations or to reflect adversely upon their actions (R. 159).

CONCLUSION.

We believe that the opinion of the Kentucky Court of Appeals falls squarely within the limitations expressed by this Court in the Giboney and Gazzam cases cited, *supra,* and for this reason we earnestly request that the petition for writ of Certiorari be denied.

Respectfully submitted,

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